

REMARKS/ARGUMENTS

Claims 1, 4 and 6-27 stand finally rejected. Applicants filed a Response After Final Rejection on September 6, 2005 (received at the USPTO on September 9, 2005). The Examiner issued an Advisory Action on October 3, 2005, which indicated that applicants' Response had overcome the rejection of claims 14 and 15 under 35 U.S.C. §112, second paragraph. The Advisory Action also indicated that the rejection of claims 1, 4 and 6-27 under 35 U.S.C. §102(b) was being maintained because, as discussed below, the Declaration filed by applicants with the Response (i.e., the Declaration of Gary O. Maupin filed under 37 CFR §1.132), had failed to overcome the rejection.

On October 26, 2005, applicants filed a Petition to withdraw the final rejection as being premature. As of the present date, no decision has been made concerning the Petition. If the Petition is granted, applicants request that this Amendment be entered as if in response to a non-final Office Action.

In the Advisory Action, the Examiner stated that the Declaration of Gary Maupin did not overcome the rejection under §102(b) for the following reasons:

- (1) the boxes were not under the continuous control of the applicant or his assistant because they were only checked once a month; and
- (2) in the Examiner's opinion, kitchen scrub pads are flexible and can constitute a flexible web as that term is understood in the art (citing to a dictionary definition of "web").

With respect to reason (2), the Examiner indicated that this reason related primarily to claim 12. It is respectfully requested that the Examiner reconsider the rejection under 35 U.S.C. §102(b) in view of the following remarks and arguments.

With respect to reason (1), there is no requirement that the invention be under the control of the inventor at every moment during its public use in order for that use to qualify as an experimental use. All that is necessary is that the inventor maintain control over the invention instead of allowing other members of the public, who are not working with or for the inventor, to have unsupervised access to or control over the invention. The field trial on Mason's Island was carried out in a remote area where it was very unlikely that members of the public would even come into contact with the devices, let alone have any access to or control over the devices. None of the devices were given to members of the public before the critical date and, as explained in the Remarks/Arguments section of the Response filed on September 9, 2005, the interior structure of the devices could not be determined from the outside of the boxes. Also, the inventors maintained control over even accidental access to the devices by keeping the devices locked with a special screw lock (see page 3, lines 14-17, of the application) while they were in the field trial on Mason's Island. The only two people on Mason's Island during the field trial that had the special tool necessary to open the devices were two of the inventors (Gary Maupin and Marc Dolan). If the Examiner would like a Statement or Declaration from these two inventors verifying that they were the only individuals on Mason's Island during the field trial with the special tool necessary to open the devices, such a Statement or Declaration can be provided.

Moreover, the Examiner has not provided any evidence that any member of the public, other than the inventors, ever had any contact with the devices during the Mason's Island field trial and before the critical date. Thus, there is no support at all for the Examiner's position that the devices were not under the control of the inventors during the Mason's Island field trial and

before the critical date. The inventors clearly maintained control by: (1) selecting a remote location where it was unlikely that any member of the public would come into contact with the devices; (2) keeping the boxes locked shut during use; and (3) regularly checking and inspecting the boxes.

With respect to the frequency that the inventors inspected the devices, it is respectfully submitted that the Mason's Island field trial was carried out over a period of five to six months with the purpose of determining how the devices would perform in the environment they were designed for. Each inspection would disturb the devices and the habitat in which they were located and would discourage the small rodents from entering the boxes. Thus, to successfully test the devices, inspections had to be kept to a minimum, which was about once a month. This frequency of inspection is normal for this type of device and in no way shows any loss of control over the devices.

With respect to the Examiner's second reason (i.e., that the kitchen scrub pad would constitute a "flexible web member"), it is respectfully submitted that the recent *en banc* decision of the Court of Appeals for the Federal Circuit in Phillips v. AWH Corp. (Federal Circuit – July 2005), has clarified the role of extrinsic evidence in the interpretation of claim terms and discourages the use of dictionaries and other extrinsic evidence for this purpose, instead favoring the specification and prosecution history of the application for the interpretation of claim terms. Here, the specification and prosecution history for the present application would not allow the term "flexible web" to encompass thin strips of kitchen scrub pad that are fixed to the lower walls and/or floor of the devices. In this arrangement, which is the arrangement used in the devices employed on Mason's Island, the strips of kitchen scrub pad are not flexible in that they do not bend in the direction that the rodent is traveling as the rodent contacts the strips. Instead,

they are relatively thin, flat pieces of sponge that are glued or stapled to the bottom of the walls and/or floor of the passageway through which the rodent must pass to get to the bait. They may deform in a straight up and down fashion if pressure is applied to them but they are not “flexible” in this configuration. Also, they are not suspended into the enclosure but are fixed to the lower walls (like a baseboard) and/or floor (like a carpet) of the enclosure.

In any event, applicants have amended claim 12 to further define the flexible web so that it is clear that the flexible web is suspended into the enclosure. This should clearly differentiate the flexible web of claim 12 from the strips of kitchen scrub pad that were fixed to the lower walls and/or floor of the devices used in the Mason’s Island field trial.

Finally, it is respectfully submitted that the determination of whether a public use is a permissible experimental use depends on a weighing of many factors, many of which were discussed in applicants’ previous Response. The Examiner did not comment on most of these factors in the Advisory Action. Applicants respectfully request that the Examiner review again the Response filed on September 9, 2005, especially the section dealing with experimental use and the fact that the Mason’s Island field trial did not establish that the invention was useful for its intended purpose until well after the critical date for the §102(b) rejection. It is respectfully submitted that when this fact is combined with the fact that the Mason’s Island field trial led to design changes that are reflected in the present claims, it is clear that the Mason’s Island field trial is not an impermissible public use of the invention under §102(b).

Finally, the devices that were used in the Mason’s Island field trial cannot possibly anticipate a claim of the present application unless those devices would meet every limitation of that claim. The Examiner has already indicated that the only claim that might read on the

devices used in the Mason's Island field trial is claim 12 because in claim 12 the term "flexible web" is not further limited by a description of the material used to create the flexible web or the positioning of the flexible web in the enclosure. However, if the other claims do not read on the devices used in the field trial, how can those claims be anticipated by such devices? The Examiner has not provided any explanation of how the devices used in the Mason's Island field trial meet each of the elements of claims 1, 4 and 6-27. Thus, on that basis alone, the anticipation rejection is deficient. It is respectfully submitted that the devices used in the Mason's Island field trial do not meet all of the elements of any of claims 1, 4 and 6-27, because, among other things, those devices did not contain an applicator that comprises a flexible web that is suspended into the enclosure.

In view of the above, it is respectfully submitted that claims 1, 4 and 6-27 are in condition for allowance.

Reconsideration of the present application and a favorable action concerning claims 1, 4 and 6-27 is respectfully requested.

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Respectfully submitted,

By 

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